



**Asia-Pacific  
Economic Cooperation**

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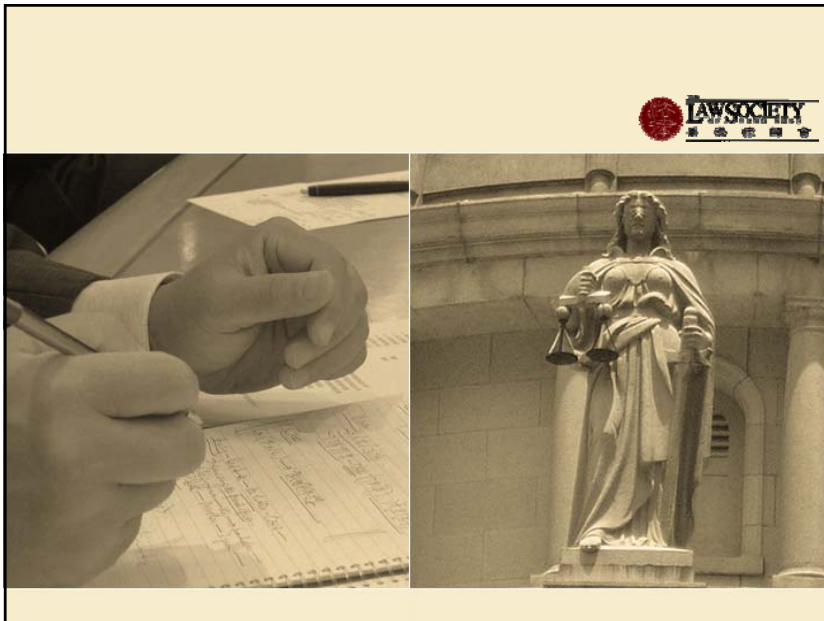
Session 10

## **Choose Mediation to Resolve Commercial Disputes**

Submitted by: Hong Kong, China



**Workshop on Dispute Resolution  
Lima, Peru  
26 February 2016**



## Escoja Mediación para solucionar Disputas Comerciales

Fecha: 26 de febrero, 2016

Evento: APEC Reunión de trabajo, Lima, Perú

Presidenta: Sra. Cecilia Wong

Miembro del Consejo, Sociedad de Derecho de Hong Kong

Presidenta, Comité de Mediación de la Sociedad de Derecho de Hong Kong

Presidenta, Iniciativa de Mediación – Qianhai ( China )





## **Choose Mediation to resolve Commercial Disputes**

Date: 26 February 2016

Event: APEC Workshop, Lima, Peru

Speaker: Mrs. Cecilia Wong

Council Member, The Law Society of Hong Kong

Chairlady, Mediation Committee of the Law Society of Hong Kong

Chairlady, Qianhai (China) Mediation Initiative



- 1. Mediation for Commercial Disputes**
- 2. Mediation versus Litigation**
- 3. Why Mediation is better**
- 4. Hong Kong, Nexus of China**
- 5. Mediation Providers in Hong Kong**





## 1. Mediation for Commercial Disputes



### Mediation

- A dispute resolution process - the mediator guides parties in a dispute through a negotiation towards an amicable resolution settlement.
- Focusing on the interests of the parties and allowing parties to take ownership of the disputes. Parties are in full control of the process and its outcome.
- The mediation process results in a settlement that is responsive to the needs of all parties, with a prospect of better compliance of agreed terms.





## President Xi's Speech

- APEC Informal Leadership Meeting in the Philippines , 19 Nov 2015
- “打造包容性經濟, 建設更美好世界”
- “保持開放包容, 謀求合作共贏, 維護多邊貿易體制”
- “Create harmonious economy, build a better world”
- “Maintain openness, co-operative, achieve win-win situation, protect multilateral trading”



## Business Focus

- Efficient and effective
  - Speedy and simple
  - Win-Win
- Costs effective
  - Using the least costs to resolve commercial disputes
- Control risk - e.g. Litigation risk
- Future business opportunities
  - Continue long term business relationship





## 2. Mediation v. Litigation



### Liability for costs of litigation

- Legal costs can be disproportionate to the disputed amount
- Chevalier (Construction) Co. Ltd. v. Tak Cheong Engineering Development Ltd. HCA 153/2008
  - Judgment damage – HK\$436,403 (US\$55,900)
  - Legal costs: Plaintiff – over HK\$1,400,000 (US\$179,487)  
Defendant – over HK\$ 1,800,000 (US\$230,769)
  - Disproportionality between costs and the judgment sum





## Disclosure of pending Court actions

- Regulatory bodies require publicly listed companies or IPO to disclose their litigation risk and on-going litigations
- Litigation affects the goodwill and stock price of a company, especially when it is involved in lengthy and costly litigation which affects the financial performance and rating of a company



## Conflict of Law

- Commercial disputes involve international companies, multiple parties and cross-border trades
- Different countries and jurisdictions have its own legal system –
  - Common Law: Hong Kong, USA, UK, Australia, etc.
  - Civil Law: China, Peru, Chile, Brazil, Japan etc.
- Choice of forum and law applicable
  - Legal matrix





## Complexity of Commercial disputes

- International agreements include:
  - World Trade Organization (WTO);
  - International Monetary Fund (IMF);
  - Free Trade Agreement (FTA);
  - Trans-Pacific Partnership (TPP);
  - Transatlantic Trade and Investment Partnership (TTIP);
  - Regional Comprehensive Economic Partnership (RCEP);
  - Free Trade Area of the Asia-Pacific (FTAAP) ;
  - Asia-Pacific Economic Cooperation (APEC)
  - Bilateral Investment Treaty (BIT) & etc



## Enforcement of Orders / Arbitral Awards

- Party obtaining a judgment in its favour may not be able to enforce it
- E.g. Assets in another place/ country-> trace all around the world to execute a judgment -> lengthen the litigation -> risk of empty judgment
- Arbitral awards
- United Nations Commission on International Trade Law (UNCITRAL)







### **Control of proceedings and costs consequence**

- For Arbitration / Litigation, once parties go to arbitration or trial, the arbitrator / Judge will decide the case and manage the case
- Party will not have control of the proceedings
- The losing party may bear the costs of winning party
- If a company is already under financial difficulty because of the commercial dispute, it may not be able to fund a litigation to recover loss



### **3. Why Mediation is better**





## Mediation - Efficient and Effective

- No concern on conflict of law, legal system
- Less costs
  - Speedy
- Enforcement
  - Parties will comply with the settlement agreement
- Judiciary's endorsement



## Mediation - Control of Process

- Process
  - Parties are free to attempt mediation
- Less tension
  - In mediation meeting room, not in court room
- Have flexibility on-
  - Choice of Mediator
  - Time
  - Rule
- Certainty of Outcome
  - Settlement agreement





## Mediation - Confidentiality

- All discussions and negotiations during mediation are confidential. Parties cannot use such information for later litigation use
- Mediator may privately discuss with one party. The mediator will keep all documents and information secret
- If the claim goes to litigation and there is a judgment, many confidential information / adverse information will be disclosed to the public and media



## 4. Hong Kong, Nexus of China





## Hong Kong Rule of Law

- One Country Two Systems
- Common Law
- Independent judiciary
- High degree of autonomy



## Hong Kong Judiciary - Chief Justice of Court of Final Appeal speech at Ceremonial Opening of the Legal Year 2016

*"This occasion enables us to reflect on the law's impact on the community, and on the roles of the Judiciary and the legal profession within it. If society puts any value on the concept of the **rule of law as a cornerstone or pillar in our community**, it is important to understand Hong Kong's legal system and how justice - for, conceptually, this is after all the purpose of law - is administered. **Hong Kong's legal system is based on the common law and on that system's characteristics of fairness, transparency and access to justice.**"*





## Mediation - Judiciary Support

- The Hong Kong Government put a lot of resources to encourage mediation
- Civil Justice reform -> encourages mediation and alternative dispute resolution
- Practice Directions 31:
  - facilitate the settlement of disputes;
  - active case management;
  - alternative dispute resolution procedure



## Mediation Figures in Hong Kong

	2011	2012	2013	2014
Mediation Certificate	2,759	2,977	2,878	3,271
Mediation Response	949	1,062	1,031	1,078
Mediation Minutes	444	508	541	602
Successful Mediation Agreement (Partial agreement)	34% (4%)	37% (1%)	44% (1%)	47% (1%)

Mediation Figures and Statistics, High Court Mediation figures (including all cases), available at: [http://mediation.judiciary.gov.hk/en/figures\\_and\\_statistics.html](http://mediation.judiciary.gov.hk/en/figures_and_statistics.html)





## Hong Kong Professional Mediators

- Mediation Ordinance (Cap.620)
  - Safeguard confidentiality of mediation
- Mediation Code – prescribe the ethical duties of mediators
  - Impartiality/ No Conflict
  - Confidentiality
  - Competence, Role of Mediator
  - Communications between parties and mediator
  - Costs of mediation



## The Law Society of Hong Kong

- Professional body for solicitors in Hong Kong
  - Compliance, external affairs, practitioners affairs, standard
- More than 65 major International law firms located at Hong Kong
- Local firms also provide excellent professional service
- Law Society Panels of experienced solicitor-mediators
  - Information available at [http://www.hklawsoc.org.hk/pub\\_e/mas/mediator/mediator\\_general\\_ms.asp](http://www.hklawsoc.org.hk/pub_e/mas/mediator/mediator_general_ms.asp)
  - Mediation direct e-mail: mediation@hklawsoc.org.hk





## Successful Mediation Airport Core Programme Hong Kong



## Airport Core Programme Hong Kong

- HK\$50 billion (US\$6.41billion) investment, Hong Kong International Airport has been one of the largest engineering and architectural projects in the world.
- Designed to handle 87 million passengers and 9 million tonnes of cargo a year.
- In 1984, the Hong Kong Government launched the Trial Mediation Scheme to settle **construction disputes** stemming from selected civil engineering contracts administered by the Hong Kong Institution of Engineers.



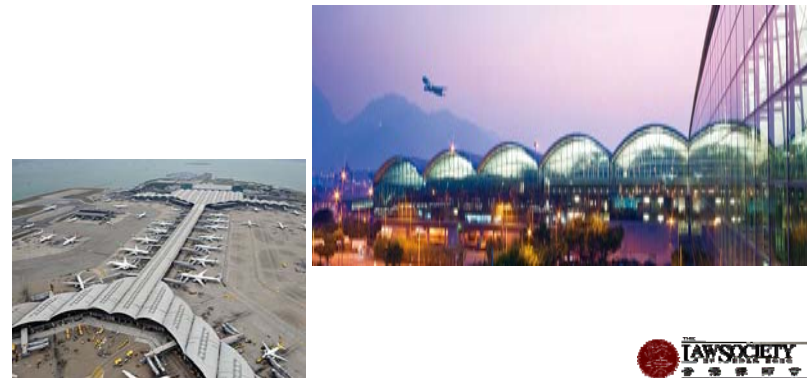


## Airport Core Programme

- In 1989, the Mediation Scheme was expanded to include major public work contracts, e.g. HKSAR Airport Core Program (“ACP”).
- Mediation was incorporated as a **mandatory requirement** to dispute resolution under ACP contracts.
- Local and International construction companies were involved in the construction
- Because of the use of Mediation, No court proceedings were initiated



## Hong Kong International Airport - 2016







## Collapse of the Lehman Brothers USA

- Lehman Brothers (LB) was a global financial institution. Before its failure in 2008, LB was the 4<sup>th</sup> largest investment bank in the US.
- On 15<sup>th</sup> September 2008, LB filed for bankruptcy protection following massive exodus of most of its clients, drastic losses in its stock and devaluation of its assets by credit rating agencies.
- In 2008, there were more than 27,000 complaints received by the SFC (Securities and Futures Commission), the Hong Kong Monetary Authority and other bodies.
- Many investors complained that they are not well-educated and the Banks provided false and misleading information



## Protest by Hundreds of Lehman Investors in Hong Kong





## Settlement of Lehman Brothers

- On 31<sup>st</sup> October 2008, the Hong Kong Monetary Authority (“HKMA”) appointed the Hong Kong International Arbitration Centre as the service provider for the Lehman Brothers-related Investment Products Disputes Mediation and Arbitration Scheme.
- The banks and most of investors achieved settlement, the investors can get back 85% of the investment



## 5. Mediation Providers in Hong Kong





## The Law Society of Hong Kong: Panel of Mediators

- Can be visited on:-
  - [http://www.hklawsoc.org.hk/pub\\_c/default.asp](http://www.hklawsoc.org.hk/pub_c/default.asp)
  - Tel: +852 2846 0500
  - Email: [mediation@hklawsoc.org.hk](mailto:mediation@hklawsoc.org.hk)
- Choice of Mediators
  - Can be appointed by President of Law Society of Hong Kong



## Financial Dispute Resolution Centre

- The Centre was set up in 2011
- Hong Kong is an international financial trading centre, the necessity of having such an organization founded FDRC's existence and value.
- Independent and impartial organisation
- To facilitate the resolution of monetary disputes between individual customers and financial institutions in Hong Kong.





## Joint Mediation Helpline Office

- Jointly founded in 2010 by several organizations including:
  - Hong Kong Mediation Council, Hong Kong Bar Association, Law Society of Hong Kong, Chartered Institute of Arbitrators (East Asia Branch), Hong Kong Institute of Arbitrators, Hong Kong Institute of Architects, Hong Kong Institute of Surveyors, Hong Kong Mediation Centre
- JMHO operates as an NGO – independent from its founder members.



**Q&A**  
**Thank you**

